Supreme Court, U.S.
FILED
JUN 9 2004

No. ~~03-1648~~

In The

Supreme Court of the United States

ALBERT A. HANNA,

Petitioner,

vs.

INFOTECH CONTRACT SERVICES, INC., and PFIZER, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THIS COURT'S HOLDING IN *DESERT PALACE, INC. v. COSTA*, 539 U.S. 90, 123 S. CT. 2148 (2003), REQUIRED THE COURT OF APPEALS TO CONSIDER WHETHER THE CIRCUMSTANTIAL EVIDENCE OF A MIXED MOTIVE IN THIS EMPLOYMENT DISCRIMINATION CASE WARRANTED DENIAL OF THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Albert A. Hanna, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on March 11, 2004, and was not published. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut was rendered on April 17, 2003, and also was not published. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on March 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2 provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . .

national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . national origin."

STATEMENT OF THE CASE

Petitioner is a naturalized United States citizen who was born in Egypt in 1962. He has resided in the United States since 1985. He is a computer technician who was employed by the Respondent Infotech Contract Services, Inc., under a written contract for a fixed term ending on December 30, 2000, and assigned by that employer as a contract worker to provide computer support services to the Respondent Pfizer, Inc., in Groton, Connecticut, from July 1998. On February 3, 2000, he was discharged by both employers.

The stated reason given for the Petitioner's termination was allegations that he had made inappropriate advances to either two or four of Pfizer's female employees. Petitioner contended, however, that these allegations were false and that he had been terminated because of anti-Arab bias on the part of a key Pfizer employee who had made an explicitly anti-Arab comment to him.

The district court granted summary judgment to both defendants, holding that the complaints of inappropriate comments by Petitioner provided a more than sufficient basis for termination and that there was insufficient evidence to support the Petitioner's contentions. The Court of Appeals affirmed in an unpublished opinion.

The evidence before the court, viewed in the light most favorable to Petitioner's position, showed that throughout his employment at Pfizer the Petitioner had received only highly positive evaluations and reviews, except for a written statement that "cultural differences" constituted a "weakness" and a recommendation that he be "more outgoing" in his relationships with Pfizer employees. The evidence further showed that Glenda Bryant, the personal secretary to a senior Pfizer manager, was among the Pfizer employees to whom the Petitioner provided computer support services. In the summer of 1999, Bryant asked the Petitioner about his ethnic background. Upon learning that Petitioner was Egyptian, Ms. Bryant stated she was uncomfortable in dealing with "Arabs," that she considered "Arabs" to be "terrorists" and believed "such people" should not be allowed into the United States. Petitioner complained about this conversation to his supervisor. On February 2, 2000, within days of the Petitioner's return from a month-long trip to Egypt, Bryant and one of her friends, also a Pfizer employee, filed complaints alleging that Petitioner had made inappropriately flirtatious comments to both of them. Petitioner was terminated almost immediately, although his supervisor did not believe Bryant's allegations. At her deposition, Bryant testified that she had been "deputized" by management to investigate the Petitioner "in a supervisory capacity so to speak." It was her post-termination investigation of the Petitioner which allegedly produced the additional two complaints.

Despite her testimony to the contrary, the district court held that Bryant was not a supervisor. Despite the circumstantial evidence placing Bryant at the center of the complaints against the Petitioner, the district court

further held that there was "no evidence" that she was behind a conspiracy to present false claims against the Petitioner.

On appeal, the Petitioner sought a remand for reconsideration in the light of this court's subsequent ruling in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003), permitting a mixed-motive analysis in a circumstantial evidence case of employment discrimination. Although fully briefed by all parties, the Court of Appeals did not even address the question.

REASONS FOR GRANTING THE WRIT

The twin factual findings of the district court are so plainly contrary to established law that they furnish no impediment to a review of the important issue presented by this case. The finding that Bryant was not a supervisor is contradicted by her testimony and ignores this court's holding in *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998). The finding that there was "no evidence" that Bryant was behind a conspiracy to falsely accuse the Petitioner is premised on the assumption that circumstantial evidence may not be considered. The circumstantial evidence of a close relationship between Bryant and the other accuser or accusers, including a dinner meeting which coincided with the filing of Bryant's complaint, and the fact that Bryant was deputized by management to conduct an investigation of the Petitioner, obviously would be sufficient to justify a jury in drawing such a conclusion. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n. 17, 77 S. Ct. 443 (1957); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970); *Desert*

Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148, 2154 (2003).

This case is almost a paradigmatic mixed-motive case. Management's reviews of the Petitioner's performance had been glowing, except for a comment about "cultural differences" and the recommendation that he be more friendly to his Pfizer co-workers. The complaints of alleged harassment against the Petitioner were replete with at least arguably ethnic references yet disclaimed his ever having made any sexually explicit remarks. It was only the absence of *direct* evidence that Petitioner's national origin was a motivating factor in his termination that prevented a mixed-motive analysis at the district court level. The refusal of the Court of Appeals to remand to permit that analysis – or even to discuss the issue although fully briefed by all parties – is inexplicable.

Desert Palace clearly has changed the legal environment in which this case must be analyzed. A remand to the district court to perform that analysis is essential to the doing of simple justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Filed Mar. 11, 2004

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 11th day of March, two thousand and four.

PRESENT:

HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,

Circuit Judges.

ALBERT A. HANNA,

Plaintiff-Appellant,

v. No. 03-7519

INFOTECH CONTRACT SERVICES, INC. and PFIZER INC.,

Defendants-Appellees.

For Plaintiff-Appellant:
THOMAS G. MOUKAWSHER,
Moukawsher & Walsh LLC, Groton, CT

For Defendant-Appellee Pfizer Inc.:
MARY A. GAMBARDELLA,
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Stamford, CT

For Defendant-Appellee InfoTech Contract Services, Inc.:
NEIL A. CAPOBIANCO, Greenburg Traurig, LLP, New York, NY

Appeal from the United States District Court for the District of Connecticut (Underhill, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Plaintiff-Appellant Albert A. Hanna appeals from a decision by the United States District Court for the District of Connecticut (Underhill, *J.*) granting summary judgment in favor of the defendants. In December 1999, Hanna entered into a one-year contract with defendant-appellee InfoTech Contract Services, Inc. ("InfoTech"), to provide computer support services to defendant-appellant Pfizer Inc. In February 2000, Pfizer requested that Hanna be removed from its account, because he had allegedly sexually harassed several of its female employees. InfoTech subsequently terminated Hanna's contract.

Hanna brought suit against InfoTech, alleging discrimination in violation of 42 U.S.C. § 2000e *et seq.* and Conn. Gen. Stat. § 46a-60 *et seq.*, as well as breach of contract, breach of the implied covenant of good faith and

fair dealing, defamation of character, and negligent infliction of emotional distress. He also named Pfizer as a defendant, alleging discrimination, tortious interference with contract, defamation, and negligent infliction of emotional distress.

The district court found that Hanna had made out a prima facie case of discrimination, but that the defendants had offered a legitimate non-discriminatory reason for their decision – namely, the multiple sexual harassment complaints from Pfizer employees. It concluded that Hanna had provided no evidence that would allow a jury to conclude that the termination of Hanna was motivated by discrimination. Hanna, who states that he is of "an Arab ethnic background," contended below – as he does here on appeal – that one of complainants, Glenda Bryant, was motivated by anti-Arab animus, and either acted to orchestrate the other harassment complaints, or exercised supervisory authority in the decision to have Hanna removed from his position at Pfizer. But the district court found (a) that Bryant was a non-supervisory employee, (b) that there was no evidence that she fomented a conspiracy to convince other women to fabricate claims against Hanna, and (c) that the key decision makers knew, at the time that they made their decision, of several other women who had reported harassing behavior. It therefore concluded that, even if Bryant harbored the discriminatory motives attributed to her, there was no way to attribute any purported animus to Pfizer itself.[1]

[1] The district court also concluded that there was insufficient evidence to support a hostile work environment claim, or a claim for discriminatory retaliation.

The district court granted summary judgment to defendant on Hanna's other claims as well. It found (a) that his employment contract with InfoTech was terminable-at-will[2] and that Hanna's discharge did not violate public policy because he was terminated for sexual harassment (b) that InfoTech had fired Hanna after its client, Pfizer, complained that he had sexually harassed several women, which no reasonable jury could find to be an action taken in "bad faith," (c) that a reasonable jury could not conclude that Pfizer had acted maliciously, and thereby tortiously interfered with Hanna's contract, (d) that the allegedly defamatory comments were "privileged," because they were made within and between corporations, *inter alia,* to protect against sexual harassment and (e) that Hanna alleged no facts that could tend to show negligent infliction of emotional distress.

We have considered all of appellant's claims and find them meritless. We therefore AFFIRM the judgment of the district court for substantially the reasons it stated.

For the Court,

ROSEANN B. MACKECHNIE,

Clerk of Court

by: /s/ Lucille Carr

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[2] In any event, the contract was certainly terminable for good cause, and the district court's findings established the existence of such cause.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALBERT HANNA,	:	
Plaintiff,	:	
v.	:	No. 3:01 CV 680 (SRU)
INFOTECH CONTRACT SERVICES, INC., and PFIZER, INC.,	:	
Defendants.	:	

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This case arises from the termination of Plaintiff Albert A. Hanna from his position with Defendant InfoTech Contract Services, Inc. ("InfoTech"). Hanna filed suit against InfoTech alleging discrimination under 42 U.S.C. § 2000e *et seq.* and Conn. Gen. Stat. § 46a-60 *et seq.*; breach of contract; breach of the covenant of good faith and fair dealing; defamation; and negligent infliction of emotional distress. Hanna also filed suit against InfoTech's client, Pfizer, Inc. ("Pfizer"), alleging discrimination; tortious interference with contract rights or financial expectancies; defamation; and negligent infliction of emotional distress. InfoTech and Pfizer filed motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on all counts (Dkt. Nos. 41, 47). For the following reasons, InfoTech and Pfizer's motions for summary judgment are GRANTED.

FACTS

Hanna is a United States citizen who was born in Egypt. He is of Arab ethnic background. InfoTech is a technology consulting firm that provides computer support personnel for its clients. Pfizer hired InfoTech to provide long term information technology consultants to work at the Pfizer campus in Groton, Connecticut.

On May 18, 1998, Hanna signed a contract (the "1998 agreement") with Winter, Wyman Contract Services, Inc. ("Winter Wyman"), InfoTech's predecessor in interest, to provide computer support services for Pfizer. The parties "approximated" the term of the contract to be three months. *Id.* at 1. After three months, "employment shall automatically be extended for successive one month periods, unless either party gives notice of its intentions to terminate this Agreement. . . ." *Id.* The 1998 agreement was terminable at will by Winter Wyman, *Id.* at 2, a fact that Hanna understood when he signed the 1998 agreement. (Hanna Dep. at 33-36.) The parties agreed that the 1998 agreement "shall be construed under the laws of the State of Massachusetts and any action brought as a result of the breach of this contract shall be brought only in a court sitting entirely within the State of Massachusetts and Employee hereby consents to the jurisdiction thereof." *Id.*

In December 1999, Hanna and InfoTech agreed to an extension of "[t]he agreement made on December 20, 1999, between Albert Hanna, and InfoTech Contract Services, Inc., for work performed at Pfizer," until December 30,

2000 (the "1999 extension agreement").[1] The 1999 extension agreement provides that "[a]ll other terms and conditions of the agreement stated above remain in effect." *Id.*

From July 1998 to February 2000, Hanna worked in "managed desktop support," providing computer services to Pfizer. (Hanna Dep. at 40.) Steven Price was in charge of the managed desktop support team to which Hanna was assigned. *Id.* at 41. Lee Torres and KC Davis were also on Price's team. *Id.* at 41.

Hanna's responsibilities consisted of responding to requests by Pfizer employees for assistance with computer problems. Each morning Hanna and other managed desktop support personnel would receive computer support request tickets from a dispatcher. (Hanna Dep. at 40.) They would then visit the person requesting assistance at his or her workstation and attempt to resolve the problem. *Id.* Hanna was assigned to respond to all tickets received from five buildings and three trailers on the Pfizer campus. *Id.* at 42. In early 2000, approximately fifty percent of Hanna's tickets were from one particular building, building 126, largely because that building had many new employees. *Id.* at 43. Because Hanna worked four ten-hour days per week, he often worked until 6:00 or 7:00 p.m. (Hanna Aff. ¶ 7.) Because he was not given his own work station, he had to use Pfizer employees' computers to access his data base queue. *Id.*

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[1] Although the 1999 extension agreement purports to extend a "December 20, 1999" contract, the intention of the parties appears to have been to extend the 1998 agreement. December 20, 1999 is apparently the date of the extension.

Aside from the alleged conduct that would lead to his termination, Hanna had a positive work record at Pfizer. His supervisor, Steven Price, thought Hanna was "a fine technician." (Price Dep. at 42.) Hanna's 1999 evaluation, the only evaluation completed while Hanna worked at Pfizer, had mostly positive things to say about his performance. (Pfizer Central Research MDS Technician Performance Commitments for Albert Hanna, Ex. 5 to Mem. in Opp. to Defs.' Mots. for Summ. J.) The most noteworthy recommendation was that "[a] more outgoing approach to your client base may help you gain even higher satisfaction ratings from your clients." *Id.* at 1.

The grounds for Hanna's claims against InfoTech and Pfizer are largely based on an encounter with Glenda Bryant, a Pfizer administrative assistant. Hanna alleges that, during a service call in the summer of 1999, Bryant inquired into Hanna's national origin and ethnicity. (Hanna Aff. ¶ 13.) Hanna claims that, upon hearing that he was of Egyptian origin, Bryant stated that she was not comfortable dealing with Arabs because Arabs are terrorists, and "such people should not be allowed into the country." *Id.* Hanna alleges that Bryant subsequently told other Pfizer employees that Hanna was a security risk. Bryant denies these claims. Hanna further alleges, and Bryant confirms, that she requested that Hanna not be assigned to her computer service requests.

Shortly after the incident with Bryant, Hanna alleges that he complained to his supervisor, Steven Price. (Hanna Aff. at 4.) Price recalled "Albert telling me that he talked with Glenda Bryant about the Middle East, the conflict in the Middle East that was going on and that I think in the same conversation that Albert told me Lee Torres is going over there." (Price Dep. at 64.) Neither Price nor Hanna

was aware why Torres was responding to Bryant's service requests. (*Id.* at 33-35, 65.)

In early February 2000, Pfizer received multiple complaints about Hanna's conduct. On February 1, 2000, Pfizer employee Pamela Close complained to her supervisor, Dr. Jay Stout, that Hanna's behavior toward her made her uncomfortable. (Close Dep. at 43-44; Stout Dep. at 9-17; Turkowski Investigation Notes at 1, Ex. H to the Memo. in Supp. of InfoTech's Mot. for Summ. J. (hereinafter "Turkowski Investigation Notes").) According to Close, Hanna had repeatedly asked her to dinner, lingered around her after business hours, and became rude when she rebuked his advances. (Close Dep. at 7-17, 33-38; Stout Dep. at 9-17; Turkowski Investigation Notes at 1.) Close complained to Stout after an encounter with Hanna the night before, January 31, 2000, in which Hanna made Close particularly uncomfortable.

Upon receiving this complaint, Stout notified Alison Turkowski of Pfizer's Employee Resources Department. (Stout Dep. at 18; Turkowski Investigation Notes at 1.) Turkowski notified Don McCauley, the Employment Resources representative for Pfizer's Information Technology Department. (Turkowski Investigation Notes at 1.) McCauley contacted Larry Foster, the supervisor of the Pfizer's Information Technology Department. (Foster Investigation Notes at 1, Ex. 12 of Obj. to Defs.' Mots. for Summ. J. (hereinafter "Foster Investigation Notes"); Turkowski Investigation Notes at 1.) On the basis of this one complaint, Pfizer reassigned Hanna to another building. (Foster Investigation Notes at 1; Hanna Dep. at 68.) Foster contacted Dan Stowe and Jodi Sklar of InfoTech to inform them of the allegations made against Hanna and

Pfizer's decision to reassign Hanna. (Foster Investigation Notes at 1.)

After calling Turkowski, Stout asked Deborah Williams, another Pfizer employee, about Hanna's conduct toward her. (Stout Dep. at 17-18.) The previous week Williams had requested that Stout notify her when he leaves the office in the evening. *Id.* After hearing Close's complaint, Stout became curious about the motivation for Williams' request, and asked Williams whether it was related to Hanna. *Id.* She stated that her request was prompted by Hanna's conduct; Hanna made her feel uncomfortable and had once suggested that she sit on his lap while he worked on her computer. (Stout Dep. at 18.) Stout called Allison Turkowski on or around January 3, 2000 informing her that there were additional Pfizer employees she should speak with. (Turkowski Investigation Notes at 1; Stout Dep. at 18.)

In the evening of February 2, 2000, Glenda Bryant had dinner with Williams and Ann Bader. (Bryant Memo., Ex. 11 at 1 to Mem. in Supp. of Pl.'s Opp. to Defs.' Mot. for Summ. J.) At that dinner, the Pfizer employees discussed the allegations against Hanna. *Id.*

According to Stout, additional employees came forward to speak with Stout about Hanna's conduct, including Ellen Olson, Charlene Chomyn, and Glenda Bryant. *Id.* at 18-19, 26. However, Chomyn denies having discussed Hanna's behavior with anyone prior to Hanna's discharge. (Chomyn Dep. at 24.) In these conversations, Stout heard that Jill Russo and Amy Bowman may have had problems with Hanna. (Stout Dep. at 25-26.) These employees appear to have come forward on February 2 and 3, 2000. After discussing their experiences with them,

Stout referred each employee to Turkowski, and notified Turkowski and Foster that additional allegations had been made. (Foster Investigation Notes at 1; Turkowski Investigation Notes at 1; Stout Dep. at 19, 24-25.)

One of the employees making a complaint was Glenda Bryant, who apparently spoke with both Stout and Foster in the morning of February 3, 2000. Bryant stated that Hanna offered to buy her flowers. She was sufficiently uncomfortable with Hanna that she requested that Lee Torres address her computer problems rather than Hanna. *Id.* at 24.

Meanwhile on February 3, 2000, Turkowski interviewed Close, who relayed the same story she had told Stout. (Turkowski Investigation Notes at 1.) Close also stated that many other employees had the same experiences she did, including "Charlene Chomyn, Debra Williams, Wendy Kneissbates, Glenda Bryant and maybe Jill Russo and Amy Bowman." *Id.* Turkowski stated that she then called Charlene Chomyn, who allegedly stated that she was "very uncomfortable" around Hanna, and that he was "too friendly and asking personal questions." *Id.* As discussed above, Chomyn denies having discussed Hanna's behavior with anyone prior to Hanna's discharge. (Chomyn Dep. at 24.) After speaking with Close and Chomyn, Turkowski called McCauley to relay the what she had found. (Turkowski Investigation Notes at 2.) McCauley indicated at that time that the client had decided to remove Hanna from the assignment with Pfizer. *Id.*

Based on the evidence presented, it appears that Pfizer's decision to remove Hanna from the Pfizer account was made at the suggestion of Larry Foster. (Foster Investigation Notes at 2; Hanna Dep. at 60.) Foster

suggested to Diane Whitesell and Don McCauley that Pfizer have Hanna removed from its account. Whitesell and McCauley agreed to have Hanna removed from the account. (Foster Investigation Notes at 2; Hanna Dep. at 60.) Whitesell, McCauley, and Foster appear to have based this decision on the complaints of Close, Williams, Olson and Bryant. They were also aware that Russo and Bowman may have had problems with Hanna, although it is not clear whether Russo and Bowman had been interviewed at the time the decision was made. Foster then notified Dan Stowe, an InfoTech representative on the Pfizer campus, of Pfizer's decision. Stowe then met with Hanna to inform him of the decision. (Foster Investigation Notes at 2; Hanna Dep. at 60, 68.)

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law, under the applicable substantive law." *Anderson*, 477 U.S. at 248. An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). Thus, if reasonable minds could differ in the interpretation of evidence that is potentially determinative under substantive law, summary judgment is not appropriate. *See R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 59 (2d Cir. 1995).

When ruling on a summary judgment motion, the court must construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson,* 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 158-59 (1970) (quoting *Diebold,* 369 U.S. at 655); *see also Aldrich v. Randolph Cent. Sch. Dist.,* 963 F.2d 520, 523 (2d Cir. 1992), *cert. denied,* 506 U.S. 965 (1992). The court may not weigh the evidence, even when the court believes such evidence is implausible. *See Anderson,* 447 U.S. at 249; *R.B. Ventures,* 112 F.3d at 58-59. Ultimately, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions. . . ." *Anderson,* 447 U.S. at 255.

The moving party bears the initial burden of showing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 327 (1986); *Langman Fabrics v. Graff Californiawear,* 160 F.3d 106, 110 (2d Cir. 1998). However, the movant need not prove an absence of a genuine issue of material fact where the nonmoving party bears the burden of proof. In such circumstances, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325.

If the movant has met the initial burden, the burden shifts to the nonmoving party to "set forth specific facts

showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 250; *see also Goenaga v. March of Dimes Birth Defects Foundation,* 51 F.3d 14, 18 (2d Cir. 1995). The nonmoving party may not rest upon the mere allegations or denials of the pleadings, but rather must present sufficient probative evidence from which a rational trier of fact could find for the nonmovant. *Celotex,* 477 U.S. at 327; *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir. 1995).

If the nonmovant fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, summary judgment is appropriate. *Celotex,* 477 U.S. at 322. In such a situation, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23 (internal quotation marks and citation omitted).

DISCUSSION

Discrimination

Hanna alleges in count one of his complaint that InfoTech and Pfizer discriminated against him in violation of 42 U.S.C. § 2000e *et seq.* and Conn. Gen. Stat. § 46a-60(a)(1), (a)(4), and (a)(8). Section 2000e(a), Title 42 of the United States Code, prohibits employers from discharging an employee because of his or her "race, color, religion, sex, or national origin." Section 46a-60(a)(1) of the Connecticut General Statutes similarly prohibits employers from firing an employee because of his or her "race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, learning disability or physical disability." Section

46a-60(a)(4) prohibits firing an employee for filing a complaint about discriminatory practices while Section 46a-60(a)(8) prohibits sexual harassment, either by the employer or the employer's agent. Hanna alleges that he was fired and forced to endure a hostile work environment on account of his national origin or ethnicity, on account of false allegations relating to sex and his gender, and in retaliation for complaining about being discriminated against on account of his national origin or ethnicity.

The court analyzes Hanna's discrimination claims under the burden shifting analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and its progeny. Under this framework, the plaintiff must first establish a prima facie case under Title VII, requiring Hanna to show that (1) he belongs to a protected class; (2) he was qualified for the position; (3) despite these qualifications, he was discharged; and (4) his position remained open and was ultimately filled by an employee not in his protected class. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 401 (2d Cir. 1998). Alternatively, Hanna may satisfy the fourth element by establishing that the decision occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class. *Id.* at 401. "A plaintiff's burden to establish a prima facie case of discrimination is de minimis." *Id.* Once the plaintiff has made out a prima facie case, the employer is required to offer a legitimate, non-discriminatory business rationale for its actions. *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). If the employer articulates such a reason, the plaintiff has the burden of proving that the proffered reason was a pretext for discrimination. *Id.*

Hanna has produced sufficient evidence to establish a prima facie case of discrimination. Defendants allege that

Hanna did not satisfactorily perform his duties because he had sexually harassed employees. However, the allegations of sexual harassment are the allegedly pretextual rationale for firing Hanna, and are more appropriately discussed under prongs two and three of the *McDonnell Douglas* test. Hanna did submit a performance review that was largely positive, and his supervisor believed he was "a fine technician." In light of this evidence, the court finds that Hanna has produced sufficient evidence that his performance was satisfactory to make a prima facie case.

Defendants also argue that Hanna has not established that his position remained open and was ultimately filled by an employee not in his protected class. Specifically, defendants argue that "Hanna's duties were absorbed by incumbent employees/contractors, who were working at Pfizer prior to Hanna's discharge." (Mem. in Supp. of InfoTech's Mot. for Summ. J. at 10.) Hanna's supervisor at Pfizer, Steven Price, stated that he took over Hanna's responsibilities after InfoTech removed him. (Price Dep. at 12-13; Foster Investigation Notes at 1.) The evidence does not indicate whether Price is in a protected class. Hanna alleges that Torres took over his responsibilities. (Hanna Aff. at 5.) Torres agrees that he took over "a lot" of Hanna's responsibilities. (Torres Dep. at 9.) Torres is not in Hanna's protected class. (Hanna Aff. ¶ 14.) Although InfoTech did not hire someone to replace Hanna, at least one employee who was not in Hanna's protected class did assume many of his responsibilities. The court concludes that this is sufficient to meet the fourth element of a prima facie case of discrimination.

The Defendants have rebutted Hanna's prima facie case by establishing that Hanna was terminated as a result of multiple allegations that he harassed female

employees of Pfizer. Pfizer made the decision to have Hanna removed from its account after receiving sexual harassment complaints from at least four Pfizer employees. Pfizer was additionally aware that at least two other employees were harassed by Hanna. Pfizer documented its investigation and the defendants have provided ample evidence of the complaints against Hanna.

The burden therefore shifts back to Hanna to prove that discrimination was the real motivation for his termination. Hanna's theory of discrimination in this case is that a non-supervisory employee hatched a conspiracy to fabricate sexual harassment claims against him because of his ethnic background or national origin. The only evidence of bias, prejudice, or racism is Hanna's allegation that Bryant, an administrative assistant, made prejudicial comments about Arabic people. Assuming Hanna's allegation is true and Bryant did make such statements, this alone would not be sufficient to prove that InfoTech fired Hanna because of his ethnicity or race. Evidence of a single conversation with a non-supervisory employee regarding her beliefs that Arabs are terrorists would not permit a reasonable jury to find that Hanna was fired because of his ethnicity.

Hanna further alleges that because Bryant allegedly does not trust Arabic people, she fabricated her sexual harassment claim against Hanna and, at a dinner on February 2, 2000, convinced two co-workers to fabricate their sexual harassment claims against Hanna. However, Hanna has provided no evidence of a conspiracy to fabricate claims. The fact that Williams, Bader, and Bryant had dinner together does not tend to prove that their claims were fabrications. Bryant had complained to Stout the day before the dinner occurred, and it is not clear that Bader

ever made a sexual harassment claim against Hanna. Even if Bader did have a complaint against Hanna, it had not been brought to Pfizer's attention at the time the decision was made to have Hanna removed. More importantly, the majority of women making complaints against Hanna were not present at the dinner. Hanna thus has not demonstrated any link between Bryant's alleged discriminatory statements and the complaints of other employees against Hanna.

Hanna similarly has not provided any evidence that the sexual harassment claims were just a pretext for Pfizer's decision to have Hanna removed. Even if Bryant's claim was a fabrication motivated by prejudice, Foster, Whitesell and McCauley had received at least three other sexual harassment claims and knew of at least two additional women who were alleged to have been sexually harassed by Hanna at the time they made the decision. Hanna has not provided any evidence, other than his own denials, that their claims are false. In light of the numbers and seriousness of the allegations against Hanna, and the absence of evidence that Pfizer's reasons were pretextual, no reasonable jury could find that the sexual harassment claims were a pretext for having Hanna removed. A reasonable jury could not conclude, on the basis of statements allegedly made only by a single, non-supervisory employee, that Pfizer was motivated by prejudice.

Hanna has also provided no evidence that he was discriminated against on account of his gender, or retaliated against for having attempted to make use of dispute resolution mechanisms after Bryant allegedly made the prejudicial statements. Although Hanna did relay Bryant's statements to Price, his supervisor, there is no evidence that Hanna was attempting to initiate dispute resolution,

that Price relayed the statements to anyone else, or that Price had any say in the decision to have Hanna removed. Other than the statements allegedly made by Bryant on a single occasion, Hanna has provided no evidence to support the claim that he had to endure a hostile work environment. Accordingly, Hanna's discrimination claim cannot survive summary judgment.

Breach of contract

In count two his complaint, Hanna alleges that InfoTech violated its employment contract with Hanna by wrongfully discharging him. The general rule under Massachusetts law is that "an employment-at-will contract can be terminated at any time for any reason or for no reason at all." *Folmsbee v. Tech School Grinding Supply, Inc.*, 417 Mass. 388, 394 (1994); *see also Jackson v. Action for Boston Community Dev., Inc.*, 403 Mass. 8, 9 (1988). The exception to the rule is that employees in certain circumstances can seek redress for terminations in violation of public policy. *Folmsbee,* 417 Mass. at 394. The employee can seek redress for public policy violations if the employee was fired "for asserting a legally guaranteed right (e.g., filing workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do what the law forbids (e.g., committing perjury)." *Id.* (quoting *Smith-Pfeffer v. Superintendent of the Walter E. Femald State School,* 404 Mass. 145, 149-50 (1989)).

Hanna claims that his discharge was wrongful because the contract was not terminable at will. However, the initial contract between Hanna and Winter Wyman expressly provided that Winter Wyman could terminate

the contract at will. Hanna understood this when he signed the agreement. The agreement extensions did not modify the terms of the original agreements, providing that "[a]ll other terms and conditions of the agreement stated above remain in effect." (1999 extension agreement.) Accordingly, Hanna's claim that his discharge was wrongful because the contract was not terminable-at-will fails.

Hanna also alleges that InfoTech wrongfully discharged him because his termination violated public policy. Specifically, Hanna alleges his termination violated public policy because he was fired on account of his national origin, ethnicity, or gender; and because he was discharged in retaliation for his good faith attempt to make use of the company's dispute resolution procedures. Both of these arguments fail because, as discussed above, Hanna was discharged for sexually harassing Pfizer employees. Hanna has submitted no evidence that he was discharged on account of his race, ethnicity, or gender, or for having made use of the dispute resolution mechanisms. Accordingly, defendants are entitled to summary judgment on count two.

Breach of the covenant of good faith and fair dealing

Count three of Hanna's complaint alleges a violation of the covenant of good faith and fair dealing, stating that "[b]y its unlawful actions, in terminating the plaintiff's employment, InfoTech violated the covenant of good faith and fair dealing that is implied in every contract for employment." The Massachusetts Supreme Judicial Court has held that a "bad faith" termination constitutes a breach of an at-will employment contract. *Fortune v.*

National Cash Register Co., 373 Mass. 96, 101-02 (1977). However, no reasonable jury could find that InfoTech terminated Hanna in bad faith. As discussed above, InfoTech fired Hanna after its client complained that Hanna had harassed its employees on multiple occasions. Hanna has not produced any evidence rebutting InfoTech's good faith rationale for terminating him.

Tortious interference with contract rights or financial expectancies

Count four of Hanna's complaint alleges that Pfizer tortiously interfered with Hanna's contract rights by inducing InfoTech to break its contract with Hanna. The Connecticut Supreme Court has made clear that not all conduct that disrupts a contract constitutes tortious interference.[2] *Blake v. Levy,* 191 Conn. 257, 260 (1983); *Weiss v. Wiederlight,* 208 Conn. 525, 535 (1988). "For a plaintiff successfully to prosecute such an action it must prove that the defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously." *Blake,* 191 Conn. at 261 (internal quotation marks and citations omitted); *Weiss,* 208 Conn. at 535 (internal quotation marks and citations omitted). In Connecticut, the burden of establishing an improper purpose is on the plaintiff. *Blake,* 191 Conn. at 262 ("In an action for intentional interference with business relations we think the better reasoned approach requires the plaintiff to plead

[2] Connecticut law governs Hanna's tort claims.

and prove at least some improper motive or improper means.").

Because Hanna has produced no evidence linking the prejudicial statements Bryant allegedly made to Pfizer's decision to request that InfoTech remove Hanna, and because Hanna has not otherwise been able to rebut Pfizer's non-discriminatory motive for its conduct, a reasonable jury could not conclude that Pfizer acted maliciously. Accordingly, summary judgment on count four is appropriate.

Defamation

Count six of Hanna's complaint alleges that "Pfizer's actions . . . constituted false, malicious, willful, wanton, reckless, and/or negligent written and oral publications charging Hanna with sexual harassment. . . ." (Compl. ¶ 30 at 11-12.) To prove that the defendants are liable for defamation, Hanna must establish that Pfizer and InfoTech published false statements that harmed him, and that the defendants were not privileged to do so. *Torosyan v. Boehringer Ingelheim Pharmaceuticals,* 234 Conn. 1, 27 (1995).

Outside of the vague description given in the complaint, Hanna has failed to provide any additional detail of the facts giving rise to his defamation claims against Pfizer and InfoTech. There is no evidence that either Pfizer or InfoTech relayed information regarding Hanna's termination to anyone outside of their respective companies, or that the information relayed within each company was not limited to that necessary to investigate the allegations against Hanna and to terminate him. (Hanna Dep. at 319-20.)

The allegedly defamatory statements made by the defendants were privileged. *See Miles v. Perry,* 529 A.2d 199 (1987) ("It is for the court to determine, as a matter of law, whether the defendant made the defamatory statements while acting on an occasion of privilege. . . ."). Statements made within each corporation, either to protect against sexual harassment or to review and terminate Hanna's employment are privileged. *See Johnson v. Chesebrough-Ponds U.S.A. Co.,* 918 F.Supp. 543 (D. Conn. 1996) ("To the extent plaintiffs are alleging that Johnson was defamed by intracorporate communications, we also note that such communications are protected by a qualified privilege. . . . Communications between managers regarding the review of an employee's job performance and the preparation of documents regarding an employee's termination are protected by a qualified privilege.") (internal quotation marks and citation omitted). Hanna acknowledges this proposition of law. (Mem. in Supp. of Obj. to Mot.'s for Summ. J. at 21 ("While a company attempting to shield its employees from sexual harassment enjoys a conditional privilege to take steps needed to accomplish this purpose, the privilege is lost where there is an improper motive lurking behind the statements.").)

Under Connecticut law, "[a] conditional or qualified privilege may be abused or lost if the defendant published or broadcast the defamatory remarks with malice, improper motive, or bad faith." *Miles v. Perry,* 529 A.2d 199, 205 (1987). Contrary to Hanna's claim, there is no evidence that the defendants were acting in bad faith; they therefore did not lose their privilege. As discussed above, Hanna has provided no evidence either that he was terminated for any reason other than for sexually harassing Pfizer employees or that he was in fact terminated on

account of his race, ethnicity, or sex, or for invoking dispute resolution mechanisms. Therefore, there is no evidence from which a reasonable jury could conclude that the allegedly defamatory statements were not privileged, and summary judgment on count five is appropriate.

Negligent infliction of emotional distress

To prove a claim of negligent infliction of emotional distress, Hanna must establish that InfoTech and Pfizer "knew or should have known that [their] conduct involved an unreasonable risk of causing emotional distress, and that the distress, if it were caused, might result in illness or bodily injury." *Buckman v. People Express. Inc.*, 205 Conn. 166, 173 (1987). Conduct giving rise to a claim for negligent infliction of emotional distress must occur in the termination process. *Parsons v. United Technologies Corp.*, 243 Conn. 66, 88 (1997) ("[N]egligent infliction of emotional distress in the employment context arises only where it is based upon unreasonable conduct of the defendant in the termination process."). However, "[t]he mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior," and therefore is not enough, by itself, to sustain a claim for negligent termination of employment. *Id.* at 88-89 (internal quotation marks and citation omitted); *see also Perodeau v. City of Hartford,* 259 Conn. 729, 751 (2002) ("[I]n cases where the employee has been terminated, a finding of a wrongful termination is neither a necessary nor a sufficient predicate for a claim of negligent infliction of emotional distress. The dispositive issue in each case was whether the defendant's conduct during the termination process was sufficiently wrongful that the defendant should have realized that its conduct involved

an unreasonable risk of causing emotional distress and that [that] distress, if it were caused, might result in illness or bodily harm.") (internal quotation marks and citations omitted).

In the present case, Hanna has not alleged, much less provided evidence, that the defendants took any actions giving rise to a claim for negligent infliction of emotional distress. Hanna's claim for negligent infliction of emotional distress, like his other claims, wholly arises from the fact that he was terminated. He has neither alleged facts nor provided evidence to support a finding that the manner in which he was fired could constitute negligent infliction of emotional distress. Because termination alone, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior, Hanna's claim for negligent infliction of emotional distress cannot survive summary judgment.

CONCLUSION

For the aforementioned reasons, the Defendants' motions for summary judgment (Dkt. Nos. 41, 47) are granted. The clerk is instructed to close the file.

So ordered.

Dated at Bridgeport, Connecticut this 17 day of April 2003.

Stefan R. Underhill
United States District Judge

(-2)

No. 03-1648

IN THE

Supreme Court of the United States

ALBERT A. HANNA,

Petitioner,

v.

INFOTECH CONTRACT SERVICES, INC. and PFIZER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PFIZER, INC.

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review the decision below in light of its holding in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which decision concerned and impacted the standard to be applied in a mixed motive discrimination case, when: (a) the Petitioner failed to even raise the argument of mixed motive at any stage below; (b) there is no evidence of mixed motive, direct or otherwise; and (c) the lower Court's factual findings properly stated and followed the applicable rules of law, consistent with the reasoning and approach to discrimination cases based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

PARTIES BELOW AND PARENT COMPANIES

The Petition states the names of the parties as they have been identified through this litigation. Pfizer, Inc. is a publicly traded company. There are no parent companies and no publicly held company which owns ten (10%) percent or more of its stock.

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No. 03-1648

IN THE

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ALBERT A. HANNA,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PFIZER, INC.

Respondent, Pfizer, Inc. ("Pfizer"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on March 11, 2004, and was not published. It has been set forth by Petitioner as

Appendix A to his Petition[1]. The opinion of the United States District Court for the District of Connecticut was rendered on April 17, 2003 and entered on April 21, 2003. It has been published as *Hanna v. Infotech Contract Services, Inc., and Pfizer, Inc.*, 2003 U.S. Dist. LEXIS 7056, 91 FEP Cases (BNA) 1459 (D. Conn. Apr. 21, 2003), *aff'd*, 91 Fed. Appx. 737 (2d Cir. Mar. 11, 2004) and has been set forth by Petitioner as Appendix B to his Petition.

JURISDICTION

Jurisdiction in the first instance was conferred on the United States District Court for the District of Connecticut pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. That Court entered final judgment on April 21, 2003. The judgment of the United States Court of Appeals for the Second Circuit was entered on March 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Petition accurately sets forth the pertinent statutory provisions.

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1. The Second Circuit's opinion can also be located at 91 Fed. Appx. 737, 2004 U.S. App. LEXIS 4692, 93 FEP Cases (BNA) 554 (2d Cir. Mar. 11, 2004).

STATEMENT OF THE CASE

A. Factual Background

Albert A. Hanna ("Petitioner" or "Hanna") was formerly employed as a computer technician by Respondent InfoTech Contract Services Inc. ("InfoTech") to provide computer support services to Respondent Pfizer, Inc. ("Pfizer"). (P. App. p. 2, 6; J.A. pp. 9-10)[2] Petitioner sought relief from the United States District Court for the District of Connecticut. In his Complaint, Petitioner primarily alleged employment discrimination on the basis of national origin and ethnicity and gender, as well as retaliation and hostile environment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and § 46a-60, *et seq.* of the Connecticut General Statutes. Petitioner also brought various state common law claims which are not made the subject of the instant Petition. (P. App. A. pp. 2-3; J.A. pp. 6-7)

Petitioner's assignment was terminated by Pfizer on account of its receiving several complaints of sexual harassment from employees, bolstered by supporting statements of other employees interviewed during the investigatory process. (P. App. pp. 3-4, 9-19, Pfizer 2d Cir. Brief pp. 11-20) Petitioner does not dispute said complaints were received; however, Petitioner asserted essentially that Ms. Glenda Bryant, a non-supervisory administrative assistant at Pfizer, fabricated a sexual harassment complaint against Petitioner; incited Pfizer employees to fabricate other,

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2. References to Petitioner's Appendix are denoted as "P. App." References to the Record on Appeal, including the joint appendix and special appendix are denoted as "J.A." and "S.A." respectively.

even more egregious, sexual harassment allegations, which she then filtered to Pfizer management; and played a pivotal role in Petitioner's removal from the Pfizer account and ultimate termination of his employment by InfoTech. (Petition for Writ of Certiorari, p. 4; P. App. pp. 8, 17-18) It is significant that Petitioner has maintained that it was Bryant alone who harbored discriminatory intent based on his ethnicity and/or national origin. (Petition for Writ of Certiorari; P. App. pp. 3, 17-18)

Petitioner's sole, purported evidence of this alleged fabrication, conspiracy, and discriminatory bias, was a single conversation he allegedly had with Bryant concerning "terrorists" from the Middle East. (P. App. pp. 8, 17-18; Pfizer 2d Cir. Brief pp. 28-31) Conversely, Pfizer proffered undisputed facts that all actions taken by Pfizer were motivated solely by legitimate, non-discriminatory reasons and that, regardless of Petitioner's national origin or ethnicity or gender, his assignment with Pfizer was terminated based solely on the allegations of sexual harassment raised against him by Pfizer employees.[3] (P. App. pp. 3-4, 9-12, 16-18; Pfizer 2d Cir. Brief pp. 11-20)

The District Court granted both Respondents' Motions for Summary Judgment against Petitioner in a Ruling issued

3. Petitioner does not dispute that his employer was InfoTech, and thus maintained his Title VII based claims against Pfizer on the theory that Pfizer was a "joint employer". While Pfizer has consistently denied it was, at any time, a "joint employer", Pfizer nevertheless recognized that the determination of its status with respect to Petitioner could have presented a question of fact. *See Peltier v. Apple Health Care Inc.*, 130 F. Supp. 2d 285, 290 (D. Conn. 2000). Pfizer thereby maintains this issue need not be determined by the Court for purposes of ruling on the Petition.

on April 17, 2003, and entered on April 21, 2003, holding that "[a] reasonable jury could not conclude on the basis of statements allegedly made only by a single, non-supervisory employee, that Pfizer was motivated by prejudice." (P. App. p. 18) More specifically, Judge Underhill properly found that although a question of fact existed as to whether Petitioner established a prima facie case of discrimination, Pfizer had nevertheless articulated a legitimate non-discriminatory reason for Petitioner's removal by "establishing that Petitioner was terminated as a result of multiple allegations that he harassed female employees of Pfizer." (P. App. pp. 16-18) The lower Court further ruled that Petitioner had failed to sustain his burden of proving the articulated reason for Pfizer's decisions was pretext for discrimination. The District Court, in so ruling, applied the standard test and process of shifting burdens set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (P. App. pp. 14-18)

In ruling that Petitioner could not proffer sufficient evidence to sustain his burden that discrimination was the real motivation for his termination, the District Court drew attention to Petitioner's implausible theory of discrimination; namely, that "a non-supervisory employee hatched a conspiracy to fabricate sexual harassment claims against him because of his ethnic background or national origin." (P. App. pp. 17-18) The District Court recognized that the only evidence of bias, prejudice or racism was Petitioner's unsupported allegation that, during a single conversation he had with Bryant in the summer of 1999, she made prejudicial comments about Arabic people. Yet, as the District Court recognized, even if this one conversation occurred as Petitioner alleged, this one event could not be deemed sufficient evidence to permit a reasonable jury to find that

Petitioner was removed from Pfizer's account by the ultimate decision makers[4] because of his national origin or ethnicity. (P. App. pp. 17-18)

Petitioner never asserted in the Complaint, nor in his opposition to the Motion for Summary Judgment, that his termination was the result of a mixed motive on the part of Pfizer; indeed, to the contrary, throughout the proceedings below, Petitioner proffered only one theory; i.e., that the employees who complained, and the employees who investigated those complaints, were induced by Bryant to fabricate the complaints, and that Bryant was solely motivated by his national origin and ethnicity. (P. App. pp. 17-18; J.A. pp. 9-22)

Petitioner appealed the ruling of the District Court. Included in his argument on appeal was the assertion that the ruling in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), required the Second Circuit Court to remand the matter to the United States District Court. (Hanna 2d Cir. Brief; Pfizer 2d Cir. Brief pp. 58-59) After the submission of briefs by all parties, and oral argument before the Second Circuit Court of Appeals on March 1, 2004, that Court ruled: "We have considered all of appellant's claims and find them meritless." Accordingly, the ruling below was affirmed in all respects. (P. App. pp. 1-4)

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4. The District Court ruled as well that Petitioner failed to sustain his burden of proof that he was the target of discrimination on account of his gender, or retaliated against for complaining to a supervisor about the alleged conversation with Bryant. It was also concluded that Petitioner could not prove that he had been subjected to a hostile work environment. (P. App. pp. 18-19) However, Petitioner did not pursue the dismissal of these claims in the Appeal to the Second Circuit Court.

B. Procedural Background

Respondents filed their Motions for Summary Judgment in the United States District Court for the District of Connecticut on July 22, 2002. The District Court granted both Motions on April 17, 2003, and entered those rulings on April 21, 2003. (P. App. pp. 5-17) Petitioner appealed those rulings to the Court of the Appeals for the Second Circuit on May 14, 2003. A decision affirming the District Court's ruling was entered by the Court of Appeals for the Second Circuit on March 11, 2003. (P. App. pp. 1-4) Petitioner filed this Petition which was docketed by this Court on June 14, 2004.

REASONS FOR DENYING THE PETITION

A. Petitioner's Assertions Regarding this Court's Decision in *Desert Palace* Do Not Warrant the Grant of Certiorari In This Case.

i. Petitioner Did Not Raise a Mixed Motive Argument With the District Court

Petitioner has brought to this Court his simple disagreement on the facts presented and a novel insistence that the lower Court should have considered arguments not even presented below. Specifically, in an attempt to avoid the proper conclusion reached by the District Court regarding the absence of evidence that Pfizer's reasons were pretextual, and that "no reasonable jury could find that the sexual harassment claims were a pretext for having Petitioner removed", Petitioner, for the first time on appeal to the Second Circuit, asked that Court to apply the mixed-motive

analysis set forth in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), having argued previously only the application of the *McDonnell Douglas* test. The District Court had absolutely no reason to address the mixed-motive test as altered by the Supreme Court's holding in *Desert Palace*, which did not, as Petitioner infers, create the mixed-motive theory for the first time, but simply clarified that presentation of direct evidence is not required where a plaintiff asserts a mixed-motive situation. (P. App. pp. 5-25)

For this reason alone, this Petition should be denied. Indeed, the Second Circuit Court has consistently held that arguments not raised in the lower court proceedings are forfeited, and cannot be raised for the first time on appeal. *See, e.g., Zerilli-Edelglass v. New York City Transit Authority*, 333 F.3d 74, 80 (2d Cir. 2003) (citing *United States v. Angell*, 292 F.3d 333, 337 (2d Cir. 2002) and *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *Ghose v. Century 21, Inc.*, 12 Fed. Appx. 52, 55 (2d Cir. 2001) (citing *Singleton*, 428 U.S. at 120 and *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)); *Baldwin v. United States Army*, 223 F.3d 100, 102 (2d Cir. 2000) (likewise citing to *Singleton*, 428 U.S. at 120, and *Greene*, 13 F.3d at 586).

The sole exception to this generally applied principle is where the Court deems an "obvious injustice" will result. *Mahant v. Lehman Brothers*, 32 Fed. Appx. 598 (2d Cir. 2002). However, even in *Mahant*, the Court recognized that appellant had been represented by counsel before the District Court and had a full and fair opportunity to raise the argument he was attempting to raise the first time on appeal. Consequently, the Court held that no "obvious injustice" had been established. *Id.* at 599 (citing *Singleton*, 428 U.S. at 120-21; and *Greene*, 13 F.3d at 586).

Likewise here, Petitioner was represented by counsel throughout all proceedings below. He had every opportunity to argue that Pfizer was persuaded by a "mixed motive" to request the termination of his Infotech assignment; however, Petitioner opted to focus solely on a conspiracy theory of discrimination, purportedly facilitated and spearheaded by one, non-supervisory employee, Glenda Bryant, with whom he had an alleged conversation about "terrorists". (Memorandum of Law in Opposition to Motion for Summary Judgment, pp. 8, 23-24; P. App. pp. 5-25) Moreover, in any event, the Court of Appeals had the discretion to entertain the argument for the first time at the appeal stage, and either rejected the opportunity to do so, or entertained the argument and determined the Petitioner's claims nevertheless failed. *See Furman v. United States*, 720 F.2d 263, 265-66 (2d Cir. 1983) (where a summary order, such as that order entered hereinbelow, is issued, there is no presumption that less than adequate consideration had been given to all claims raised in the appeal). The judgment entered by the Second Circuit clearly provided that all of the Petitioner's claims had been considered. (P. App. p. 4) Consequently, Petitioner has not established the proper basis for exercise of this Court's certiorari jurisdiction based on the *Desert Palace* ruling.

ii. Even if Desert Palace Should Have Been Applied, Certiorari Is Not Warranted

In the alternative, even if the holding of *Desert Palace* had been applied, a mixed-motive analysis would not have salvaged Petitioner's claims. Specifically, it was recognized that Petitioner was unable to establish by a preponderance of the evidence that a protected characteristic played *any* role whatsoever in Pfizer's decision making, not to mention whether this characteristic was a motivating factor.

Noteworthy on this point, the entire Petition rests on blatant mischaracterizations of the record below. Specifically, Petitioner claims that Bryant professed to have been "deputized" by management to investigate the Petitioner "in a supervisory capacity". (Petition for Writ of Certiorari at 3) This quote is represented to have been taken from Bryant's deposition testimony. However, what Bryant actually stated was as follows: "My boss asked me to talk to any of the ladies that might have had a problem with Albert, to see if they were all right. Since there are no female supervisors, he was putting me in *supervisory capacity so to speak as a woman to make sure that they were all right* and to give them moral support; that Pfizer would not tolerate unwarranted actions by anybody." (Bryant Depo. pp. 50-51, as J.A. p. 412 in record on appeal) (emphasis added). Moreover, the notion of being "deputized" does not appear. Clearly then, Bryant never suggested she was placed into any supervisory position to conduct an investigation or to make any decisions. The Courts below clearly considered this actual testimony, and not that version crafted by Petitioner. In any event, this dispute with the Second Circuit Court's factual determination on this point is unsuitable for resolution by the exercise of certiorari jurisdiction.[5]

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5. Petitioner similarly distorts his own testimony concerning the conversation he had with Bryant, purportedly regarding "Arabs". Contrary to the version presented in the Petition, and to the Court below, his actual deposition testimony confirmed that Bryant never impugned *all* Arabic people as he now disingenuously alleges before the Second Circuit Court, but reflected an opinion regarding "terrorists" from that part of the world. (Pfizer 2d Cir. Brief pp. 28-30, citing Hanna deposition pp. 79-81, located in the record on appeal at J.A. pp. 85-87) Here again, however, certiorari should not be used to resolve Petitioner's disagreement with the factual findings of the courts below.

In short, the lower Courts properly concluded Petitioner had not, and could not, demonstrate any nexus between Bryant's alleged discriminatory statements or bias, and the complaints of Pfizer employees against Petitioner. Nor was any evidence presented to connect alleged discriminatory statements by Bryant, a non-supervisory employee, to alleged discrimination by Pfizer when it decided to request the removal of Petitioner from its InfoTech account.[6] Petitioner's mixed-motive analysis thus would have failed for the same reasons his discrimination claim failed; his inability to proffer sufficient evidence of any link between Bryant's purported bias and Pfizer actions. It bears repeating, then, that Petitioner has only presented his disagreement with factual findings of the lower Courts; *i.e.*, an assertion for the correction of factual

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6. More specifically, as the lower courts recognized, there was no evidence whatsoever to support Hanna's assertion that Bryant had a significant role in his discharge. There was no evidence that she fabricated her own complaint. There was no evidence that she improperly influenced or misled decision makers. There was no evidence that she invented or embellished complaints of others against Hanna. (P. App. pp. 3-25; Pfizer 2d Cir. Brief pp. 11-20, 33-36, 52-55) Critically important, contrary to the distortions of the record portrayed in Hanna's appeal, there was no evidence that decision makers had any reason to suspect fabrications by any employee whom they interviewed. (*Id.*) On the contrary, the uncontraverted evidence was clear that Pfizer employees had concerns regarding Hanna's conduct towards them, and that management and human resource personnel conducted a proper investigation. The fact that Bryant conferred with the other Pfizer employees, two of whom had already lodged their complaints, is irrelevant. There was no support for Hanna's blatantly misleading and conclusory statement that "Bryant's key role in Hanna's discharge was the amplified product of the bigoted words she used with him"; on the contrary, the only evidence was that Bryant was merely *one* of several women whose statements the Pfizer decision makers considered before requesting that Hanna be removed from its Infotech account. (*Id.*)

error, and not a "principal purpose" for this Court's exercise of its certiorari jurisdiction, warranting denial of the Petition. *Braxton v. United States*, 500 U.S. 344, 347 (1991). *See also Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) (the Court's "certiorari jurisdiction is designed to serve broader purposes than the correction of error in particular cases").

B. The Decisions Below Are Consistent With Those of Other Circuits

While Petitioner casually asserts the ruling in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) was "ignored" by the Appellate Court, he does not provide any support for this assertion. Specifically, Petitioner argues that Bryant should have been deemed a "supervisor" under a *Burlington* analysis. (Petition for Writ of Certiorari p. 4) However, Petitioner misstates the rulings below; contrary to his suggestions here, the District Court noted *three* primary bases for its decision that Petitioner was unable to establish pretext for discrimination, only one of which was a finding that evidence was lacking to establish Bryant was a supervisor. (P. App. pp. 14-19) The District Court also determined there to be a lack of evidence to demonstrate the existence of a conspiracy hatched by Bryant based on Petitioner's ethnicity, or that the key decision makers knew, at the time they made the subject decision, of such a conspiracy. (P. App. pp. 9-18) Bluntly stated, Petitioner's argument that the lower Court erred in not considering Bryant a "supervisor" blatantly misrepresents the record below; more accurate is that the lower Court already addressed the alternative scenario; i.e., even if Bryant was somehow viewed as having acted in a supervisory capacity, Petitioner still failed to bridge the significant gap between Bryant's alleged comments to Petitioner and the

action of the Pfizer decision makers. (P. App. pp. 17-18) Petitioner simply defied the record evidence, alleging: "she acted with such powers when she interviewed witnesses and functioned as the filter through which alleged complaints passed to Foster," in addition to misapplying case law such as the decision in *Burlington*.

Petitioner thereby fails to address the totality of the rationale of the lower Courts, or to establish why, even if there was error in their findings regarding Bryant's status, that the ultimate holding would have been different in view of the persuasive power of the remaining bases. Petitioner's attempt to suggest a "disagreement" with binding judicial precedent is thereby disingenuous, and Petitioner's similar effort to manufacture a conflict among the circuits or with other decisions below, merely by claiming that *Burlington* was "ignored", masks an agenda that he knows renders this case unworthy of review. In reality, his arguments rely on the premise that the Courts below erred as a matter of fact in reviewing the evidence. As a decision on the issue here will not change the outcome of the Petitioner's case without such a fact-specific inquiry, review should be denied. *United States v. Johnson*, 268 U.S. 220 (1925) ("This Court, however, do[es] not grant certiorari to review evidence and discuss specific facts."); *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (Stevens, J., regarding denial of cert.) (Court should "decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases."); *accord Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). *See also Somerville v. United States*, 376 U.S. 909 (1964); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959). Bluntly stated, the instant ruling is patently consistent with decisions below, simply applying the *McDonnell Douglas* analysis, and no novel rationale was

necessary for the District Court to reach its conclusion after application of the *McDonnell Douglas* test. (P. App. pp. 2-4, 14-19)

C. The Petition Does Not Present An Important Issue

Petitioner, for those same reasons explored in detail above, has failed to establish the existence of any constitutional or otherwise sufficiently important issue to warrant the grant of certiorari here. First, as demonstrated, he fails to explain why the mixed motive concept was never argued before the District Court, and thus, why *Desert Palace* should even be addressed. As previously noted, the *Desert Palace* Court did not introduce a novel concept; *i.e.*, it did not *create* the mixed-motive theory of liability, but simply clarified that direct evidence was not required to establish such mixed motive. Thus, any suggestion by Petitioner that he lacked the ability to argue this concept before the District Court should be rejected. Second, and also as demonstrated, he has nevertheless failed to establish that the application of *Desert Palace* would have made a difference in the outcome below. Third, he has failed to present anything other than a request for a correction of an alleged error in fact finding, which itself warrants denial of his Petition. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949). In short, the Petition merely presents objections to the decision below, none of which are appropriate for this Court's review or resolution on this record. Petitioner simply disagrees with the Court of Appeal's application of this Court's precedent to the facts of his case. Such a disagreement is certainly not tantamount to constituting or presenting a conflict between a decision of any Circuit Court and any ruling of this Court, or otherwise of posing a significant issue for resolution.

CONCLUSION

For the foregoing reasons, Respondent Pfizer, Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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